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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 08-30312

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID STRUCKMAN,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

Defendant, David Struckman, appeals from a judgment of conviction entered against him by the United States District Court for the Western District of Washington (Honorable Robert M. Takasugi, presiding). The district court had jurisdiction under 18 U.S.C. 3231. The judgment of the district court constitutes an appealable final order. The district court sentenced defendant on July 28, 2008, and entered its judgment on August 15, 2008. Defendant filed a timely notice of appeal on August 25, 2008. *See* Fed. R. App. P. 4(b)(1)(A). Jurisdiction for this appeal lies under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly refused to dismiss the indictment against defendant based on what defendant claims was an improper extradition disguised as a deportation.

2. Whether the district court erred by refusing to dismiss the indictment for government misconduct the court found and instead ruling that certain evidence would not be admitted at trial.

STATEMENT OF THE CASE

On May 11, 2004, a grand jury sitting in the Western District of Washington returned an indictment charging defendant with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. (R. 8.) 1/ On July 20, 2005, a grand jury returned a superseding indictment, realleging the count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and adding three counts of attempting to evade the assessment and payment of federal income tax, in violation of 26 U.S.C. 7201. (E.R. 99-136; R. 131.) On November 8, 2007, following a seven-day jury trial, defendant was found guilty on all counts. (R. 483.) On July 28, 2008, the district court sentenced defendant to 70 months' imprisonment, to be followed by three years' supervised release. (E.R. 93-94; R. 536, 537.)

Defendant filed a timely notice of appeal. (E.R. 89-90; R. 541.)

1/ "E.R." references are to the excerpts of record filed with defendant's opening brief. "S.E.R." references are to the supplemental excerpts of record filed with the government's responsive brief. "R." references are to the original record on appeal, as prepared by the Clerk of the District Court. "H.Tr." references are to the court reporter's transcript of the hearing on defendant's motion to dismiss the indictment. "PSR" references are to the presentence investigation report prepared by the probation officer. "Br." references are to defendant's opening brief.

STATEMENT OF FACTS

In 1996, defendant co-founded a marketing business known as Global Prosperity Marketing Group ("Global") with Daniel Anderson, who became defendant's partner in the business. (PSR ¶¶ 25, 26.) In 1998, Lorenzo Lamantia became the third partner in Global. (PSR ¶ 26.) Between 1996 and 2002, when Global ceased operations, the company received gross receipts in excess of $46,000,000. During that period, all Global-related businesses had taxable income of $20,798,931, with a corresponding tax liability of $7,557,230. (PSR ¶¶ 26, 36.) Defendant's personal tax liability for the period totaled $2,672,947. (PSR ¶ 36.)

Global was an internet-based marketing business that advocated various anti-government and anti-taxation theories and sold an audiotape series that espoused those views. (PSR ¶ 25; H.Tr. 95, 101.) Defendant and his partners selected and approved the tape series. (PSR ¶ 31.) Global also organized offshore seminars where its members could meet with various Global-approved vendors promoting certain investment products, including foreign and domestic trusts and offshore bank accounts. (PSR ¶ 25.) 2/ The Global tapes and seminars offered information on a "sovereignty" theory, which falsely claimed that an individual could "opt-out" of the federal tax system by disassociating from the government by such means as "rescinding" one's Social Security number and discontinuing the use of government-issued documents such as drivers' licenses and birth certificates. (PSR ¶ 28.) Global also advocated that members structure their financial affairs using foreign trusts and W-8 bank accounts, which non-resident aliens, foreign entities, and certain exempt foreign persons may properly use to avoid

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2/ At the seminars, defendant represented himself as one of the founders and principals of Global. (PSR ¶ 27.)

certain IRS reporting rules, as well as backup withholding of tax. (PSR ¶ 28; H.Tr. 106.)

Defendant, Anderson, and Lamantia employed the methods advocated in Global's products to structure Global's financial affairs, as well as their own personal financial affairs. (PSR ¶ 31.) Defendant and his partners created a two-tiered system of "trust" entities and related bank accounts to conceal Global's gross receipts and profits, using trusts sold by two of Global's vendors. (PSR ¶32.) They used the first tier of trusts and related bank accounts (Tier One accounts) to deposit in excess of $40,000,000 in gross receipts from the sale of Global products. (PSR ¶ 32.) None of the Tier One bank accounts had valid Tax Identification Numbers, with most purporting to be for foreign entities exempt from tax withholding. (PSR ¶ 32.) Defendant and his partners used a second layer of "trust" entities (Tier Two accounts) to receive their respective shares of the Global profits. (PSR ¶ 33.) The Tier Two entities employed offshore bank accounts provided by other Global vendors. (PSR ¶ 34.) Global did not report the profit distributions to the IRS. (PSR ¶ 33.) Defendant did not pay income tax on the profits distributed to him by Global. (PSR ¶ 33.) However, defendant did use his Tier Two entities and related offshore bank accounts to acquire a $740,000 home, two boats, and numerous vehicles, and to pay for extensive home renovations and boat repairs. (PSR ¶ 35.)

Global was structured as a network marketing firm, relying on a cadre of members known as Qualified Retailers ("QR") to sell its products to the general public. Global never received money for its products directly from the public. Instead, members of the general public purchased Global's retail products from the QRs, paying by cashier's check or money order. (PSR ¶ 26.) After receiving

payment from customers, the QR then paid Global the wholesale cost of the goods. (*Id.*) 3/

In August 1997, defendant submitted a signed affidavit to the Secretary of State for the State of Washington, announcing to the IRS and other agencies a "termination of trusteeship" over his labor and property rights. (PSR ¶ 29.) Defendant's affidavit also stated that he was not a citizen of the United States, but rather a citizen of the "Sovereign Republic State" of his residence. (PSR ¶ 29.)

At the times the original and superseding indictments were returned, defendant was resident in the Republic of Panama. (S.E.R. 23, 33.) Defendant arrived in Panama on February 10, 2004, and continued to reside there on an expired tourist visa until January 2006, despite the fact that, on August 25, 2004, Panama ordered that he be deported. (H.Tr. 133-134, 162; S.E.R. 23-24.) Defendant was arrested in Panama on January 11, 2006. (H.Tr. 227-228; S.E.R. 30.) At the time of his arrest, defendant was found in possession of a Venezuelan passport in a false name. (H.Tr. 233-234; S.E.R. 30.) On January 13, 2006, the Republic of Panama deported defendant to the United States. (H.Tr. 153, 175, 223; S.E.R. 35.)

Defendant made his initial appearance in the United States District Court for the Western District of Washington on February 17, 2006. (R. 180.) On April 24, 2007, and May 10, 2007, defendant filed motions to dismiss the indictment, alleging, *inter alia*, that Panama's deportation of defendant was actually an illegal extradition by the United States and that the government had engaged in various misconduct, including misconduct that resulted in *Brady v. Maryland*, 373 U.S. 83

3/ The wholesale price was approximately 20 percent of the retail cost. (PSR ¶ 26.)

(1963), and *Giglio v. United States*, 405 U.S. 150 (1972), violations. (R. 361, 387.) The District Court held a three-day evidentiary hearing on defendant's motions, from July 9, 2007 through July 11, 2007. (R. 424, 425, 428.) Following the close of the hearing, the court ordered the parties to submit post-hearing briefs further addressing specific aspects of the motions to dismiss. (R. 428, 440.)

On October 19, 2007, the district court entered a written order denying defendant's motions to dismiss. (R. 449; E.R. 1-83.) The district court first rejected defendant's argument that he was illegally extradited by the United States from Panama. The court determined that the treaty between Panama and the United States does not provide that extradition is the only method whereby one nation may return a criminal defendant to the other nation. The court then found that the United States made no extradition demand of Panama and instead that Panama independently decided to deport defendant. (R. 449 at 66; E.R. 66.) On the basis of the act of state doctrine, the court refused defendant's invitation to address the interpretation of Panamanian law by Panamanian authorities. (R. 449 at 66-67; E.R. 66-67.)

The district court then addressed the allegations of government misconduct that defendant claimed merited dismissal of the indictment. The court rejected defendant's argument that Timothy O'Brien, the regional security officer stationed at the United States Embassy in Panama, deprived defendant of the right to counsel at the time of his arrest in Panama and prevented defendant from exercising his due process right to challenge his deportation from Panama. The court noted that defendant was ordered deported on August 25, 2004, and found that defendant had failed to make a showing that, at the time he was detained on January 12, 2006, he had any viable rights under Panamanian law to challenge the

deportation order. (R. 449 at 67-68; E.R. 67-68.) The court also noted that the deportation order preceded any interference with defendant's communication with counsel. (R. 449 at 68; E.R. 68.) Although the court concluded that O'Brien's actions, including various misstatements to Panamanian authorities regarding defendant's status, were less than exemplary, the court determined that because the misrepresentations regarding defendant's legal status occurred after the Republic of Panama had ordered defendant's deportation, the misrepresentations had no effect on the issuance of the order of deportation. (R. 449 at 69-70; E.R. 69-70.) The court determined that O'Brien broke no laws, and it therefore declined to sanction the United States for O'Brien's conduct. (R. 449 at 70; E.R. 70.)

The district court also addressed defendant's allegation that the government engaged in various misconduct in connection with Gary Moritz, the person referred to by the IRS agents investigating this case as "Anonymous Informant No. 1" or "Ted." The court concluded that Moritz "cannot be the source of all the information attributed to him." (R. 449 at 73; E.R. 73.) The court found that the highly detailed information attributed to Moritz was inconsistent with Moritz's relationship to defendant through Moritz's wife, who was Struckman's ex-wife, and Moritz's step-daughters. (R. 449 at 75; E.R. 75.) The court determined that, by suppressing the actual source of the information attributed to Anonymous Informant No. 1, information material to a defense of government misconduct, the government committed a *Brady* violation. (R. 449 at 77; E.R. 77.) The court also found that IRS Special Agent Michael Hardaway improperly failed to disclose the extent of his contacts on behalf of Dave Bowden, an intended government witness, with other IRS employees who were conducting a civil audit of Bowden's tax returns. (R. 449 at 77-81; E.R. 77-81.) The court determined that these contacts

were *Giglio* materials that should have been disclosed to the defense. (R. 449 at 81; E.R. 81.) The court concluded that "the taint of the violation [of defendant's rights] can be neutralized by excluding any evidence attributed to" Moritz and "by excluding Dave Bowden as a witness against the defendant at trial." (R. 449 at 82; E.R. 82.) The court concluded that "[b]ecause trial has not occurred and the taint of the violation can be prevented, by excluding the tainted evidence, thus preserving the defendant's right to a fair trial while allowing the government to prosecute the accused, dismissal is not warranted." (R. 449 at 82; E.R. 82.)

BAIL STATUS OF DEFENDANT

Defendant reports (Br. 20) that he is currently serving his term of incarceration.

SUMMARY OF ARGUMENT

1. Defendant was deported by Panama, not extradited by Panama to the United States. Accordingly, the district court properly refused to dismiss the indictment for what defendant characterizes as an improper extradition. Most of defendant's arguments are premised on his incorrect contention that Panama extradited him to the United States at the United States' request. As the case law makes plain, however, for an action to constitute an extradition, there must be a formal demand pursuant to the relevant extradition treaty. Here, there was no such demand. Instead, the language of the relevant Panamanian documents makes it evident that Panama deported defendant for its own reasons and purposes. This alone defeats defendant's claim that he was improperly extradited.

Defendant's claim that the only method by which one nation may obtain personal jurisdiction over a person located in another country that the first country wishes to try criminally is by proceeding according to the relevant extradition

treaty is unsound and not supported by the relevant legal authorities. The Supreme Court's decision in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), is controlling on this question. The Court held in *Alvarez-Machain* that unless an extradition treaty specifically states that extradition pursuant to the treaty is the only method by which one treaty partner may obtain custody of a person located in the territory of the second treaty partner for the purpose of prosecuting that person, any means used to bring that person before a court in the first treaty partner is sufficient to establish personal jurisdiction to try that person. The extradition treaty between Panama and the United States does not contemplate extradition as the sole means by which a criminal defendant may be transferred from Panama to the United States. Indeed, three circuit courts of appeals have all concluded that no provision in the extradition treaty between the United States and Panama requires the nations to employ only the procedures set forth in the treaty when Panama returns a criminal defendant to the United States. This Court has also recognized the principle that unless an extradition treaty specifically states otherwise, the United States may employ extra-treaty means to obtain personal jurisdiction over a criminal defendant.

The principles of international law and the law of nations do not require reversal. Even if he had standing to argue that various international treaties had been violated, he would be entitled to no relief, because his claims lack merit.

Misconduct by a United States agent in Panama did not require dismissal of the indictment. Agent O'Brien's actions did not result in a violation of defendant's constitutional rights. Defendant had no Sixth Amendment right to counsel in the Panamanian deportation proceedings. Moreover, defendant has not established that, after failing to timely challenge the Panamanian deportation

order, he had a right under Panamanian law to challenge his deportation by filing a habeas corpus petition. Agent O'Brien's actions were not so egregious as to warrant the exercise of a court's supervisory powers to dismiss the indictment. O'Brien's erroneous statements to Panamanian authorities occurred after the deportation order was final. Dismissal of the indictment was not required.

2. The district court did not err when it refused to dismiss the indictment for what defendant characterizes as improper surveillance, the laundering of illicitly obtained information, and various discovery violations. The trial court's decision to instead suppress certain evidence and exclude the testimony of several government agents was consistent with the Supreme Court's directive to tailor remedies to the injury suffered. Moreover, defendant has not shown that the surveillance impinged upon his right to confidential conversations with his attorney. The district court properly determined that the taint of the illicitly obtained and laundered evidence could be neutralized by excluding that evidence.

ARGUMENT

I

BECAUSE PANAMA'S DEPORTATION OF DEFENDANT WAS NOT, AS DEFENDANT CLAIMS, AN EXTRADITION MASQUERADING AS A DEPORTATION, THE DISTRICT COURT CORRECTLY REFUSED TO DISMISS THE INDICTMENT

Standard of Review

Jurisdictional issues are reviewed *de novo* on appeal. *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006). This Court reviews *de novo* the denial of a motion to dismiss an indictment. *United States v. Bueno-Vargas*, 383 F.3d 1104, 1106 (9th Cir. 2004) (motion to dismiss on constitutional grounds); *United States v. Latu*, 479 F.3d 1153, 1155 (9th Cir.) (motion to dismiss on due

process grounds), *cert. denied*, 128 S. Ct. 164 (2007). "A district court's factual findings, however, including those on which a denial [of a motion to dismiss] may be based, are reviewed for clear error." *United States v. Hickey*, 367 F.3d 888, 891 n.3 (9th Cir. 2004). A district court's interpretation of statutes, as well as its interpretation of treaties to which the United States is a party, is reviewed *de novo*. *Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 954 (9th Cir. 2006); *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078, 1079 (9th Cir. 2005).

Argument

Defendant argues (Br. 25-55) that the district court erred by refusing to dismiss the indictment based on what defendant characterizes as an improper extradition masquerading as a deportation. He argues (Br. 25) that the district court misunderstood the scope of its authority and erroneously concluded that dismissal of the indictment was only appropriate if defendant established that the government formally invoked extradition procedures. He also argues (Br. 25-26) that the district court misread the decision of the Supreme Court of Panama as endorsing the legality of the deportation. Defendant claims (Br. 30-32) that the district court erred by refusing to consider all the evidence which, defendant contends (Br. 38-46), supported a finding that defendant was extradited from Panama, rather than deported. He further argues (Br. 27-30) that extradition in violation of an extradition treaty mandates dismissal of an indictment, a proposition he contends (Br. 33-38) is supported by the law of nations. Defendant also argues (Br. 46-55) that the district court should have exercised its supervisory authority to dismiss the indictment because the court's personal jurisdiction over defendant was only obtained through what defendant characterizes as violations of his rights by agents of the United States. Each of defendant's claims lacks merit.

First, the fundamental problem with most of defendant's arguments is that he was deported by Panama, not extradited from Panama at the request of the United States. 4/ The Supreme Court long ago defined "extradition" as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289 (1902). This Court has opined that "[n]either deportation nor surrender other than in response to a demand pursuant to Treaty constitutes extradition." *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1404 (9th Cir. 1988) (citing *Stevenson v. United States*, 381 F.2d 142, 144 (9th Cir. 1967); *Emami v. United States Dist. Court for the N. Dist. of California*, 834 F.2d 1444, 1453-54 (9th Cir. 1987)). Where "no demand for extradition is made by the United States and the defendant is deported by the authorities of the other country which is party to the treaty, no 'extradition' has occurred and failure to comply with the extradition treaty does not bar prosecution." *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (citing *Stevenson*, 381 F.2d at 144; *United States v. Lovato*, 520 F.2d 1270, 1272 (9th Cir. 1975)); *see also United States v. Noriega*, 117 F.3d 1206, 1213 (11th Cir. 1997) ("to prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty

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4/ Defendant also makes various statements suggesting that he was abducted from Panama by United States agents. In fact, as the district court found (E.R. 20-21), defendant was arrested in Panama by the Panamanian National Police, and then ordered detained by the National Director of Immigration and Naturalization, before being deported from Panama. (S.E.R. 35.) Defendant was not forcibly abducted by United States agents.

partner"); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (*en banc*) ("Whether or not treaty violations can provide the basis for particular claims or defenses . . . depend[s] upon the particular treaty and claim involved.").

Contrary to defendant's claim (Br. 25-26), the district court did not err in reading the decision of the Supreme Court of Panama as holding that defendant was legally deported from Panama. By Resolution Number 10885, dated August 25, 2004, the National Director for Immigration and Naturalization of the Republic of Panama notified defendant that his requested change in status from tourist to immigrant had been denied and that he was granted at least three and no more than 30 days to leave Panama. (S.E.R. 23-24.) 5/ The resolution also informed defendant that "the recourses of Reconsideration and Appeal, established by Article 86 of Decreed Law No. 16 of June 30, 1960, may be resorted to against the present resolution." (S.E.R. 24.) 6/

That same day, in Resolution Number 10886, the National Director for Immigration and Naturalization noted that defendant had an arrest warrant pending against him in the United States and was a fugitive from justice, which, under Articles 36 and 37 of Decreed Law No. 16 of June 30, 1960 (S.E.R. 6, 19), afforded the Ministry of Justice and the Interior the right to expel defendant and generally prohibited the Republic of Panama from extending citizenship to

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5/ The resolution referenced Article 65 of Decreed Law No. 16 of June 30, 1960, which provides that foreigners who stay in Panama after the expiration of their visas shall be "turned over to the Ministry of Foreign Affairs, so that appropriate measures be taken." (S.E.R. 10, 20.)

6/ Under Article 86, a motion to reconsider the Resolution or an appeal from the Resolution must be taken within three business days of actual or constructive notification to the subject of the Resolution. (S.E.R. 12, 21.)

defendant. (S.E.R. 25-26.) The National Director therefore ordered defendant's arrest "for reasons of security and public order" so that "any of the measures contemplated in Decreed Law No. 16 of June 30, 1960, may be applied." (S.E.R. 26.) In Resolution Number 10887, also issued on August 25, 2004, defendant was ordered arrested and detained "for reasons of security and public order." (S.E.R. 27-28.) Both Resolutions 10886 and 10887 also advised defendant of "the recourses of Reconsideration and Appeal." (S.E.R. 26, 28.)

On or about January 11, 2006, defendant, who claimed at the time to be a Venezuelan citizen (E.R. 19), was arrested by the Panamanian National Police. (S.E.R. 30.) Upon his arrest, defendant was fingerprinted. The fingerprints confirmed defendant's identity. (E.R. 20.) On January 11, 2006, defendant, whose time to move to reconsider or appeal from the order of deportation had expired in 2004, filed a habeas corpus petition with the Supreme Court of Justice of Panama. (E.R. 20.) On January 12, 2006, the National Director of Immigration and Naturalization ordered the arrest of defendant for "carrying irregular documents . . . and for having a pending arrest warrant . . . as a result of being a fugitive of United States justice." (S.E.R. 30.) On January 13, 2006, defendant was sent out of Panama. (E.R. 20; S.E.R. 35.)

On April 4, 2006, the Supreme Court of Justice of Panama rejected defendant's habeas corpus claim. (S.E.R. 32-36.) After quoting statements by the National Director of Immigration and Naturalization, the Panamanian court held that it could not consider defendant's claim, "because he is outside the jurisdiction of Panama, *due to the fact that he was deported in compliance with Resolution No. 107886* [sic] *of August 25, 2004 . . . .*" *Id*. (emphasis added). (S.E.R. 35.) The plain language of the Panamanian Supreme Court's statement makes it pellucid

that defendant was deported by Panama in compliance with the resolution of the National Director of Immigration and Naturalization. The resolution, after noting that defendant had a warrant for his arrest pending on federal charges in the United States and was a fugitive from United States justice, determined that, consistent with Panamanian law, defendant was a candidate for expulsion from Panama and was ineligible for Panamanian citizenship. And the resolution required the Panamanian Immigration and Naturalization Directorate to "take all appropriate security measures in order to combat crime," including defendant's arrest "[s]o that any of the measures contemplated in Decreed Law No. 16 of June 30, 1960, may be applied." (S.E.R. 25-26.) This was, incontrovertibly, an instance in which Panama decided for its own reasons that defendant would not be allowed to remain in its national territory. *See Stevenson*, 381 F.2d at 144 (deportation is a unilateral act whereby a nation removes a person from its jurisdiction "for its own purposes"). And under the Act of State Doctrine, which "directs United States courts to refrain from deciding a case when the outcome turns upon the legality or illegality (whether as a matter of U.S., foreign, or international law) of official action by a foreign sovereign performed within its own territory," *Riggs Nat'l Corp. v. Comm'r*, 163 F.3d 1363, 1367 (D.C. Cir. 1999), this Court should not second guess the Supreme Court of Panama's conclusion that defendant was properly deported from Panama. Defendant's claims to the contrary (Br. 25-26, 49-50) must be rejected, and all of his arguments predicated on the assertion that he was extradited necessarily fall. 7/

7/ Because defendant was deported rather than extradited, his argument (Br. 38-41) that the extradition treaty excludes pure tax crimes from the offenses for which extradition may be obtained is of no moment and need not be addressed.

However, defendant contends (Br. 25, 30-32, 38-46) that the evidence he adduced established that there was a de facto violation of the extradition treaty between the United States and Panama, and that irrespective of how his removal from Panama is labeled, he was actually extradited from Panama at the request of the United States. But defendant's argument is foreclosed by *Terlinden*, *Oen Yin-Choy*, and *Valot*, which make it plain that there is no extradition unless one nation formally requests extradition of a person under the applicable treaty and the other nation formally surrenders that person pursuant to the treaty. *Terlinden*, 184 U.S. at 289; *Oen Yin-Choy*, 858 F.2d at 1404; *Valot*, 624 at 310; *see also Stevenson*, 381 F.2d at 144 ("While the formalities of extradition may be waived by the parties to the treaty . . . , a demand in some form by the one country upon the other is required, in order to distinguish extradition from the unilateral act of one country, for its own purposes, deporting or otherwise unilaterally removing unwelcome aliens") (citations omitted); Treaty between the United States of America and the Republic of Panama Providing for the Mutual Extradition of Criminals, May 25, 1904, U.S.-Panama, 34 Stat. 2851, T.S. 445, Art. III ("Requisitions for the surrender of fugitives from justice *shall be made by the diplomatic agents of the contracting parties*, or in the absence of these from the country or its seat of government, may be made by the superior Consular Officers.") (emphasis added). 8/

8/ Defendant relies (Br. 31-32) on a statement in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), that "'[e]xtradition' is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. 'Deportation' is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken." *Id*. at 709. However, that statement was mere dictum and has no binding effect. The question in *Fong Yue Ting* involved the constitutionality of section 6 of the Chinese Deportation Act of May 6, 1892, 27 Stat. 25, which required Chinese laborers to obtain a certificate of residence from the collector of internal revenue

Defendant does not dispute that there was no formal invocation of the extradition treaty here and that no diplomatic agent of the United States to Panama requested defendant's return to the United States. And he cites to no case involving facts similar to those here 9/ in which a court has held that contacts between a United States agent and law enforcement agents in a foreign nation regarding the location of a fugitive from justice constitutes a request for extradition. Defendant's argument fails. 10/

Moreover, the extradition treaty between the United States and the Republic of Panama does not contemplate extradition as the sole means by which a criminal defendant may be transferred from Panama to the United States. And in fact, as the district court determined (E.R. 66) and as demonstrated above, the Republic of Panama deported defendant for its own reasons. And even if defendant's deportation was facilitated by an agent of the United States, that does not defeat the district court's personal jurisdiction over defendant. Indeed, the general rule is that the means used to bring a criminal defendant before a court do not deprive that

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or face deportation. 149 U.S. at 700 & n.1, 703. The statement defendant cites was merely an explanation of language in an 1893 translation of a treatise that the Supreme Court cited as support for the proposition that "[t]he right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country." 149 U.S. at 707. Defendant's reliance on *Fong Yue Ting* is misplaced.

9/ On January 6, 2006, Agent O'Brien sent a letter to the sub-director of the Panamanian Immigration and Naturalization Directorate informing him that defendant was then present in Panama and using a false identity supported by a false Venezuelan passport. (E.R. 20.)

10/ Because there was no violation of the extradition treaty between the United States and Panama, this Court need not address defendant's argument (Br. 27-30) that extradition in violation of an extradition treaty mandates dismissal of the indictment. As demonstrated, the United States obtained personal jurisdiction over defendant as a result of Panama's deportation of defendant as an undesirable alien.

court of personal jurisdiction over the defendant. *See United States v. Alvarez-Machain*, 504 U.S. 655, 661-62 (1992) (citing and quoting *Ker v. Illinois*, 119 U.S. 436, 438, 444 (1886) (court not deprived of jurisdiction over defendant who was kidnaped in Peru and forcibly returned to Illinois for trial); *Frisbie v. Collins*, 342 U.S. 519, 521-22 (1952) (forcible abduction from one state to another in violation of Federal Kidnaping Act did not invalidate subsequent conviction and sentence)); *Anderson*, 472 F.3d at 666.

Nevertheless, the general rule does not apply, and a court is deprived of jurisdiction over a defendant, if (1) the transfer of the defendant violated the applicable extradition treaty or (2) the United States government engaged in "misconduct 'of the most shocking and outrageous kind'" to obtain the defendant's presence. *United States v. Matta-Ballesteros*, 71 F.3d 754, 762-64 (9th Cir. 1995) (quoting *United States v. Valot*, 625 F.2d at 310); *Anderson*, 472 F.3d at 666. Under *Alvarez-Machain*, a challenge to a court's personal jurisdiction over a defendant based on the manner in which that person was brought into the United States from another nation must first be evaluated in light of the language of the extradition treaty between the United States and the other nation. 504 U.S. at 662 ("our first inquiry must be whether the abduction of [Alvarez-Machain] from Mexico violated the Extradition Treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit [Alvarez-Machain's] abduction, the rule in *Ker* applies, and the court need not inquire as to how [Alvarez-Machain] came before it."); *see Anderson*, 472 F.3d at 666. If the relevant extradition treaty between the United States and the other nation "does not purport to specify [that extradition pursuant to the treaty is] the only way in which one country may gain custody of a national of the other country for the

purposes of prosecution[,] . . . to infer . . . [that the treaty] prohibits all means of gaining the presence of an individual outside of [the] . . . terms [of the treaty] goes beyond established precedent and practice." *Alvarez-Machain*, 504 U.S. at 664, 668-69.

Defendant argues (Br. 41-44), however, that *Alvarez-Machain* is no longer good law and that, in fact, the only way in which one nation may obtain personal jurisdiction over a person in a foreign nation that the first nation wishes to try criminally is by proceeding according to the relevant extradition treaty. According to defendant, the fact that the United States and Mexico entered into a treaty prohibiting trans-border abductions shortly after the Court issued its decision in *Alvarez-Machain* effectively overruled the Court's conclusion that a nation may obtain the presence of an individual by means other than pursuing extradition, and represents a new rule of customary international law that must be followed.

This Court, however, is not at liberty to declare that *Alvarez-Machain* has been overruled. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989); *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 911 (9th Cir. 2009). As the Supreme Court explained in *Rodriguez de Quijas*, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." 490 U.S. at 484.

In any event, the treaty on which defendant relies applies only to relations between the United States and Mexico and does not purport to apply to relations with all nations or to change the law stated in *Alvarez-Machain*. Indeed, if there had been a change in law, the treaty's prohibition on trans-border abductions

would have been unnecessary. Moreover, a prohibition on trans-border abductions is not a prohibition on obtaining a person as a result of a deportation.

Further, if the President and Congress had disagreed with the Supreme Court's holding in *Alvarez-Machain*, the President could have entered into treaty negotiations with all of the United States' treaty partners to amend the various extradition treaties to reflect such a new understanding of customary international law as claimed by defendant, or Congress could have enacted a law, signed by the President, that specifically limited to extradition the manner in which United States courts may obtain personal jurisdiction over a fugitive present in a foreign country. *See United States v. City Nat. Bank & Trust Co.*, 491 F.2d 851, 854 (8th Cir. 1974) ("If a change is desired, Congress can enact a new statute"). This did not occur. And, as discussed further below, to read into each of the extradition treaties the United States maintains with foreign nations a provision that the treaty is the sole means by which a person may be transferred from one nation to another would be inappropriate: a treaty's plain language must control absent "extraordinarily strong contrary evidence." *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

Moreover, in recent years, *Alvarez-Machain* has been favorably cited several times, including by this Court, for the proposition that personal jurisdiction may be obtained over foreign persons forcibly brought into the United States to stand trial. *See, e.g.*, *United States v. Shi*, 525 F.3d 709, 724 n.6 (9th Cir.), *cert. denied*, 129 S. Ct. 324 (2008); *United States v. Mejia*, 448 F.3d 436, 443 (D.C. Cir. 2006); *United States v. Best*, 304 F.3d 308, 312 (3d Cir. 2002) ("it appears clear that the *Ker-Frisbie* doctrine has not eroded"); *see also United States v. Burke*, 425 F.3d 400, 408 (7th Cir. 2005) ("Personal jurisdiction is supplied by the

fact that Burke is within the territory of the United States. Whether he came to this nation in a regular manner does not affect the court's authority to resolve the criminal charges against him.") (citing *Alvarez-Machain*)). If any of these courts believed that the continued validity of *Alvarez-Machain* was in doubt, they certainly would have said so. *Alvarez-Machain* remains binding precedent.

Furthermore, three courts of appeals that have analyzed the terms of the Treaty between the United States of America and the Republic of Panama Providing for the Mutual Extradition of Criminals, May 25, 1904, U.S.-Panama, 34 Stat. 2851, T.S. 445 ("Extradition Treaty") have all concluded, contrary to defendant's assertion (Br. 39), that no provision of the Extradition Treaty requires the United States and Panama to employ only "the extradition procedures set out in the treat[y] when [Panama] return[s] criminal defendants to the United States." *United States v. Cordero*, 668 F.2d 32, 37 (1st Cir. 1981) (Breyer, J.); *accord United States v. Noriega*, 117 F.3d at 1213; *United States v. Mejia*, 448 F.3d at 443. In *Cordero*, after noting that "Extradition treaties normally consist of commitments between governments to the effect that each will return those accused of certain crimes at the request of the other," the First Circuit specifically determined that "Nothing in the [extradition] treaty prevents a sovereign nation from deporting foreign nationals for other reasons and in other ways should it wish to do so." 668 F.2d at 37. The District of Columbia Circuit compared the relevant language in the U.S.-Panama treaty with the language in the U.S.-Mexico treaty at issue in *Alvarez-Machain*, finding that "[l]ike the U.S.-Mexico treaty, the U.S.-Panama treaty contains no prohibition against procuring the presence of an individual outside the terms of the treaty -- let alone one barring the signatories from informally cooperating with each other as they did in this case." *Mejia*, 448

F.3d at 443 (citations omitted); *see also The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) ("to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on [the Court's] part an usurpation of power, and not an exercise of judicial functions"); *Maximov v. United States*, 373 U.S. 49, 54 (1963) ("it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign when . . . there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories"). Indeed, as the First Circuit stated, "[t]o hold that extradition treaties forbid foreign nations to return criminal defendants except in accordance with the formal procedures they contain, would insofar as we are aware, represent a novel interpretation of those treaties. Under any such interpretation, extradition treaties would hinder, rather than help serve, the return of those accused of crimes within American jurisdiction." *Cordero*, 668 F.2d at 38.

Consistent with *Alvarez-Machain*, this Court has recognized the principle that unless an extradition treaty specifically states otherwise, the United States may employ extra-treaty means to obtain personal jurisdiction over a criminal defendant. In *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995), this Court held that where the applicable extradition treaty between the United States and Honduras did not prohibit United States Marshals from abducting Matta-Ballesteros from his home in Tegucigalpa, Honduras, and forcibly returning him to the United States, the district court had jurisdiction over Matta-Ballesteros. *Id*. at 762-63. The court commented that even though it was concerned by the government's actions, Matta-Bellesteros's abduction did not divest the federal

courts of jurisdiction in the case because the relevant extradition treaty did not specifically prohibit the abduction. *Id*. at 763. The *Matta-Ballesteros* decision made it plain that unless a treaty between the United States and another nation specifically provides otherwise, extradition is not the only way in which the United States may gain jurisdiction over persons outside its borders. In *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *rev'd and remanded on other grounds*, 505 U.S. 1201 (1992), this Court concluded that "[u]nder accepted principles of international law, in the absence of an extradition treaty there is no general *obligation* of nations to surrender persons sought by another nation, although a nation may surrender such individuals as a matter of comity and discretion." 939 F.2d at 1349 (emphasis in original) (citation omitted). "[T]he fact that there is an extradition treaty between two nations is no bar to one of those nation's *voluntarily* surrendering an individual to the other without invocation of the treaty." *Id*. at 1352 (emphasis in original) (citing *United States v. Valot*, 625 F.2d at 310 (finding no treaty violation where Thai authorities surrendered defendant to United States authorities in Thailand)). Given this line of authority, it is clear that extradition is not the sole means by which Panama may deliver a defendant to the United States and that it is entirely proper for Panama and the United States to work together to facilitate the deportation. Thus, Panama's deportation of defendant into the hands of United States authorities, with the assistance of U.S. authorities, 11/ was not impermissible, and the United States

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11/ In addition to notifying the Panamanian Immigration and Naturalization Directorate in January 2006 that defendant was then present in Panama and using a false identity supported by a false Venezuelan passport (E.R. 20), O'Brien stated, in a document dated June 2004, that the U.S. Embassy was hoping to have defendant deported from Panama and was considering revoking defendant's passport, "[w]hich means he's immediately deportable," and that O'Brien had met with the Panamanian National Police to assist in locating defendant. (E.R. 17.) In January

properly obtained personal jurisdiction over defendant. Defendant's motion to dismiss the indictment was properly denied.

Defendant also argues (Br. 33-38) that principles of international law and the law of nations support dismissal of an indictment "whenever a person is seized and surrendered without the nation following the extradition laws and treaties in procedure and in substance." But as amply demonstrated above, defendant was not seized but was instead deported by Panama for its own reasons, defendant was not extradited at the request of the United States, and he was not abducted by United States law enforcement agents and forcibly removed by such officers to the United States. Defendant's argument is therefore unsound.

In any event, as a general principle of international law, individuals do not have standing to challenge violations of international treaties in the absence of a protest by a sovereign treaty signatory. *See Matta-Ballesteros v. Henman*, 896 F.2d 255, 263 (7th Cir. 1990); *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986); *United States v. Hensel*, 699 F.2d 18, 30 (1st Cir. 1983). A treaty will be construed as creating enforceable private rights only if the treaty expressly or impliedly provides a private right of action. *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884). Multilateral treaties do not confer such rights on private individuals. *See Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (United Nations Charter does not confer rights on private individuals). Thus, defendant may not plead the various treaties he cites as a basis for reversing his convictions and ordering the indictment dismissed. His argument must be rejected.

2006, O'Brien confirmed for the Panamanian National Police that the fingerprints of a man the National Police had arrested matched the fingerprints known to belong to defendant. (E.R. 20.)

Defendant makes various claims about improper conduct by United States agents in Panama (Br. 26-27, 46-55), which he argues led to violations of his rights and resulted in what he alleges was his de facto extradition. Defendant references (Br. 49, 54-55) incorrect statements made by Officer O'Brien to the Panamanian government, and defendant claims that O'Brien "worked to circumvent the rights to counsel, due process and the courts." Defendant also asserts (Br. 51-52) that if he had been afforded access to his retained Panamanian counsel, he would not have been deported from Panama and would not have been tried in the instant case. According to defendant (Br. 55), this conduct should have led to dismissal of the indictment. These claims are meritless.

A court has inherent supervisory powers to order of dismissal of a prosecution (1) to implement a remedy for the violation of a recognized constitutional or statutory right, (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury, and (3) to deter future illegal conduct. *United States v. Hastings*, 461 U.S. 499, 505 (1983); *Matta-Ballesteros*, 71 F.3d at 763. 12/ Only where the defendant demonstrates government misconduct of the most shocking and outrageous kind will due process be violated and the court be required to divest itself of jurisdiction. *Valot*, 625 F.2d at 310; *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir. 1975). A court may also exercise its supervisory powers to dismiss an indictment for outrageous

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12/ In *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (*en banc*), this Court determined that a court's inherent supervisory powers are not limited to only the three areas listed in *Hastings*, but also include the power to sanction bad-faith conduct by awarding attorneys fees to the other party, the power to establish a rule that failure to object to a report by a magistrate judge waives the right to appeal the district court's judgment, and the power to order the government to identify prospective witnesses. 526 F.3d at 511 n.9. None of those additional powers are at issue here.

government conduct that falls short of a due process violation. *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991). To justify exercise of the court's supervisory powers, the prosecutorial misconduct must be flagrant and must cause "substantial prejudice" to the defendant. *Id*. at 1093; *United States v. Tucker*, 8 F.3d 673, 674-75 (9th Cir. 1993) (*en banc*) (prejudice is "a trigger to the exercise of supervisory power").

Defendant's constitutional rights were not violated. First, defendant had no Sixth Amendment right to counsel in connection with the Panamanian proceeding, and his right to counsel therefore was not violated. The Sixth Amendment is not binding on foreign courts. *See Flynn v. Shultz*, 748 F.2d 1186, 1197 & n.10 (7th Cir. 1984). Moreover, the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. But the Sixth Amendment right to counsel does not extend to deportation proceedings, such as the hearings in Panama that are at issue in the instant case, or extradition hearings. *See*, *e.g.*, *Singh v. Gonzales*, 499 F.3d 969, 972 n.2 (9th Cir. 2007); *see also Alexander v. Alameida*, 397 F.3d 1175, 1180 (9th Cir. 2005) (right to counsel did not attach at extradition hearing because such hearing is not inception of adverse criminal proceedings); *United States v. Yousef*, 327 F.3d 56, 142 (2d Cir. 2003) (extradition proceedings do not independently trigger any Sixth Amendment protections). The proceedings in Panama had no direct connection to the criminal charges upon which defendant was prosecuted in the Western District of Washington, instead involving only his deportability. Thus, the proceedings in Panama were not of a kind in which defendant would have had a constitutional right to counsel in this country.

Moreover, defendant has failed to demonstrate that he even had the right to challenge his deportation under Panamanian law. As explained above, defendant was ordered to leave Panama on or before September 23, 2004, and was given a limited period within which he could challenge the order. (S.E.R. 12, 21, 24, 26.) Defendant did not challenge the order of deportation within the applicable period, and therefore, as the district court concluded, had no viable right to challenge the order (E.R. 68), whether with or without the assistance of counsel. Because defendant did not have the right to an attorney in connection with the deportation proceeding, and because defendant had no basis upon which to challenge his deportation even if he had been represented by counsel, any actions by Officer O'Brien that prevented defendant from speaking with his attorney did not violate defendant's constitutional rights and do not support defendant's claim that the district court erred by refusing to dismiss the indictment for violation of such rights. *See Valot*, 625 F.2d at 310.

Moreover, Officer O'Brien's actions were not so egregious as to warrant the exercise of a court's supervisory powers. *See Barrera-Moreno*, 951 F.2d at 1091; *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991) ("less-than-exemplary conduct of the government, sleazy investigatory tactics alone -- unless so offensive that they amount to a violation of due process -- do not provide the clear basis in . . . law . . . required for the exercise of the supervisory power. Unless the law enforcement officers break the law, the court has no authority to sanction them." (internal quotation & citation omitted)). As the district court noted (E.R. 68, 70), all of the misstatements by Officer O'Brien that defendant points to as improper occurred well after Panama decided to deport defendant, and they therefore had no impact on the order of deportation.

Although O'Brien misrepresented to Panamanian authorities that defendant was a convicted felon who was awaiting service of his sentence and O'Brien claimed without proof that defendant was perpetrating the same kind of fraud scheme in Panama that he had been charged with conducting in the United States, the misstatements were not made under penalties of perjury, and defendant fails to show that the district court clearly erred in finding that "O'Brien broke no law." (E.R. 70.) In particular, defendant has not shown that O'Brien broke any law in preventing defendant from speaking with his Panamanian lawyer regarding defendant's deportation in 2006: defendant has not demonstrated that he had any right to an attorney in his Panamanian habeas challenge to the deportation. Thus, the district court properly refused to exercise its supervisory power to dismiss the indictment, *see Simpson*, 927 F.2d at 1090; and there was no basis for a dismissal in order to deter future illegal conduct, *see Hastings*, 461 U.S. at 505.

Finally, because judicial integrity was not undermined here, given that none of O'Brien's actions occurred inside the courtroom, *see Simpson*, 927 F.2d at 1091, dismissal under the court's supervisory power on that basis would not have been appropriate.

In sum, the district court properly denied defendant's motion to dismiss on the basis of what he characterizes as an improper extradition.

II

THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT SUPPRESSION OF CERTAIN EVIDENCE RATHER THAN DISMISSAL OF THE INDICTMENT WAS THE APPROPRIATE REMEDY FOR SPECIFIC GOVERNMENTAL MISCONDUCT

Standard of Review

This Court reviews *de novo* the denial of a motion to dismiss an indictment. *Bueno-Vargas*, 383 F.3d at 1106; *United States v. Latu*, 479 F.3d at 1155. "A district court's factual findings, however, including those on which a denial may be based, are reviewed for clear error." *Hickey*, 367 F.3d at 891 n.3.

Argument

Defendant argues (Br. 55-58) that the district court erred when it refused to dismiss the indictment for what defendant characterizes as improper surveillance, the laundering of illicitly obtained information, and various discovery violations and instead determined that the proper remedy was the suppression of certain evidence and the exclusion of testimony from several government agents. Defendant is wrong.

In general, "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Under Rule 16(d)(2) of the Federal Rules of Criminal Procedure, a court may sanction a party for failing to comply with a discovery request by, *inter alia*, granting a continuance, prohibiting the offending party from introducing the undisclosed evidence at trial, or entering "any other order that is just under the circumstances." Fed. R. Crim. P. 16(d)(2). The sanctions imposed rest within the sound discretion of the district court. *See United States v. Balk*, 706 F.2d 1056, 1060 (9th Cir. 1983).

Relying primarily on *United States v. Orman*, 417 F. Supp. 1126 (D. Colo. 1976), defendant argues (Br. 55-57) that the use of surveillance by the agents in this case so prejudiced him that the indictment should have been dismissed. But although defendant claims that the surveillance offered the government "unique previews of Struckman's anticipated defense, with the AI/Ted memorandums littered with references to legal strategies for the grand jury and criminal proceedings," he does not point to any particular memorandum or quote any specific language that supports his claim. Accordingly, this Court should not consider the argument. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs"); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones").

In any event, the facts in *Orman* were substantially different from the facts here. In *Orman*, as part of their surveillance of an alleged heroin distributor, agents of the DEA listened in on attorney-client conversations between the accused and her federal public defender. 417 F. Supp. at 1130-32. The district court concluded that "where there is surveillance of attorney-client conferences, prejudice must be presumed." 417 F. Supp. at 1133. Determining that the government could not overcome the presumption, the court dismissed the indictment. *Id*. Here, by contrast, defendant has not established that the government overheard any attorney-client conversations between defendant and his counsel, whether in Panama or in the United States. Given that distinction, the rule in *Orman* is inapplicable, even if it was binding on this Court. Such a drastic remedy would be

inconsistent with the Supreme Court's admonition that the remedy for any misconduct must be tailored to the harm. *See Morrison*, 449 U.S. at 364.

Defendant also complains (Br. 57) about what he alleges was the "laundering" of "illicitly obtained" evidence through "bogus 'confidential' informants." But as the district court concluded (E.R. 82), "[b]ecause the trial has not occurred . . . the taint of violation can be neutralized by excluding any evidence attributed to AI-1/Ted." The district court's solution was consistent with *Morrison*, 449 U.S. at 364, and defendant has not established that the district court's decision to bar the government from offering the testimony rather than dismissing the indictment was error.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted,

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FEBRUARY 2009

STATEMENT OF PRIOR OR RELATED CASES

Pursuant to Rule 28-2.6 of the Rules of this Court, counsel for the appellee respectfully inform the Court that they are unaware of any related cases.

CERTIFICATE OF COMPLIANCE
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AND CIRCUIT RULE 32-1
FOR CASE NUMBERED 08-30312

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Attorney for: The United States of America – Plaintiff/Appellee

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I hereby certify that on February 5, 2009, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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